UNITED STATES SUPREME COURT

Docket No.- 80-6818

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SUPREME COURT, U.S.

ALLEN RODZIEWICZ, # 64141
New Jersey State Prison;

Petitioner-Appellant;

-V-

CARY J. HILTON, Superintendent,
Trenton State Prison, and

JOHN J. DEGNAN, Attorney General of the
State of New Jersey;

Respondents-Appellees.

Civil Action-28 USC 2254

~~On~~ Petition for certiorrari to the United States Court Of Appeals For The Third Circuit.

Sat Below:

Hunter and Sloviter, Circuit Judges.

BRIEF ON BEHALF OF PETITIONER-APPELLANT

ALLEN RODZIEWICZ # 64141
Drawer "N"
Trenton State Prison
Trenton, N.J. 08625
Petitioner-Appellant, Pro Se

PRESENTLY CONFINED

I

QUESTIONS PRESENTED FOR REVIEW

1. Is N.J.R. 2:9-4 unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment because it allows New Jersey appellate courts to allow bail pending appeal without a statement of reasons?

2. Did the District Court err when it failed to grant the petitioner summary judgement pursuant to F.R. Civ. P. 56 and 81 (a)(2)?

3. Did the District Court err when it failed to issue a show cause order pursuant to 28 U.S.C. 2243?

4. Did the District Court err in considering the nunc pro tunc answer of the respondents?

5. Did the District Court err in it's interpertation of 28 U.S.C. 2245, as construing the facts in the original petition to be accepted as true when they were unrefuted?

6. Did the District Court, when an evidentiary hearing was not ordered even though facts were at issue, violate the due process rights of the petitioner?

7. Should the District Court have issued a conditional writ which would have become affective absent the New Jersey Supreme Court admitting the petitioner to bail pending appeal or issuing a statement of reasons for the denial of bail?

II

PARTIES INVOLVED

8. Allen Redziewicz, petitioner-appellant, pro se, State

Prison No. 64141, Drawer "N", Trenton State Prison, Trenton, N.J. 08625, appeared on his own behalf before the United States District Court For The District Of New Jersey at Trenton, and before the United States Court Of Appeals For The Third Circuit.

9. Respondent Gary J. Hilton[1], Superintendent, Trenton State Prison, Trenton, New Jersey was represented by John J. Degnan[2], Attorney General of the State of New Jersey, who was also named as a respondent and appeared pro se (Katherine A. Smith, Deputy Attorney General, Of Counsel) in both District Court and the Circuit Court.

III

OPINIONS RENDERED BELOW

10. Petitioner first moved for bail pending appeal to the trial court at the time the jury returned a verdict of guilty of first-degree murder, and his bail was revoked, on March 7, 1980, that court the New Jersey Superior Court denied the motion on March 21, 1980.[3] Petitioner then moved to the New Jersey Superior Court,Appellate Division for bail which referred the matter to the New Jersey Supreme Court, the state's highest tribunal which denied the petitioner bail on March 25, 1980 (Pa 1).[4] Petitioner then filed a petition for a writ of habeas corpus in United States District Court which was denied

[1]Hilton is no longer the Superintendent of Trenton State Prison, Elijah Tard was designated as Acting Superintendent on May 4,1981, after the Third Circuit had rendered their opinion.

[2]Degnan is no longer Attorney General of the State of New Jersey, James A. Zazzalli was designated Acting Attorney General sometime before the ruling by the Third Circuit while the petitioner was temporarily in cussdy in Denver,Colorado awaiting sentencing on a conviction there. However Katherine A. Smith is still a deputy attorney general as to the best of the petitioner's knowledge.

(Pa 2-6) and appealed to the Third Circuit where he was denied a certificate of probable cause (Pa 7).

IV

JURISDICTION

11. The United States Court of Appeals For The Third Circuit ruled against the petitioner on May 1, 1981. This Court has jurisdiction to review the actions of a Circuit Court of Appeals in ruling on an action initiated pursuant to 28 U.S.C. 2254.

VI

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

12. The Due Process Clause of the Fourteenth Amendment.(Pa 8).
13. 28 U.S.C. 2243 (Pa 9)
14. 28 U.S.C. 2245 (Pa 10)
15. 28 U.S.C. 2254 (Pa 11)
16. F.R.Civ.P. 56 (Pa 12)
17. F.R.Civ.P. 81(a)(2) (Pa 13)
18. N.J.R. 2:9-4 (Pa 14)

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[3] This is an unreported opinion which was not in writing but read in open court and stenographically transcribed. The New Jersey Supreme Court has refused to provide the petitioner with more than one copy of this proceeding, being that he is in custody he has no method to reproduce the transcript.

[4] Pa 1-14 indicates materials appearing in petitioner's attached appendix.

VII

STATEMENT OF FACTS

19. Paragraph ten of this petition contains the procedural history of proceedings in this matter.

a. This action becameinitiated in federal court after the petitioner was arbitrarily denied bail pending appeal of his conviction for first-degree murder that occurred in the Superior Court of New Jersey, Law Division. When petitioner exhausted state remedies by appealing the denial of bail to the New Jersey Supreme Court, the state's highest tribunal, he was then being unconstitutionally held since he was not afforded due process when seeking bail pending appeal in the New Jersey courts. The constitutionality of N.J.R. 2:9-4 was first contested in the District Court in the action brought pursuant to 28 U.S.C. 2254. Petitioner was first aggrieved by N.J.R. 2:9-4 when the New Jersey Supreme Court denied bail, and in conformance with the rule whose constitutionality the petitioner contests, did not provide a reason why bail had been denied. He immediately brought the issue of the constitutionality of the rule in his petition filed in the District Court.

b. All other issues, which are enumerated in paragraphs one through seven,are procedural rules that deal with actions that are mandated by either Title 28 of the United States Code or the Federal Rules of Civil Procedure. These issues arose at the District Court level, and were first dealt with at that level.

VIII

LEGAL ARGUEMENT

A

N.J.R.2:9-4 IS UNCONSTITUTIONAL, SINCE IT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY ALLOWING NEW JERSEY APPELLATE COURTS TO DENY BAIL PENDING APPEAL WITHOUT A STATEMENT OF REASONS.

20. The rule is unconstitutional since it imposes a requirement of a statement of reasons why bail pending appeal is denied only upon the trial court. This condones the arbitrary denial of bail by the New Jersey appellate courts. The one sentence opinion by Chief Justice Wilentz of the New Jersey Supreme Court, herein attached as Pa 1 is a shocking arbitrary denial of the petitioner's due process rights. It flagrantly disregards the principle that due process is ensured during all proceedings and that a criminal defendant is entitled to due process of law when applying for bail pending appeal of a state conviction. The opinion of the District Court in this matter violates the principles of Abate V. Malcolm, 397 FSupp 715 (E.D.N.Y. 1975), vacated as moot 522 F2d 826 (2nd Cir. 1975); Abbott v. Laurie, 422 FSupp 976 (D.R.I. 1976); and Bad Heart Bull v. Parkinson, 381 FSupp 985 (D.S.D. 1974) which ensure due process during an application for post-conviction bail.

B

THE DISTRICT COURT ERRED WHEN IT REFUSED TO GRANT THE PETITIONER SUMMARY JUDGEMENT PURSUANT TO F.R.CIV.P. 56 AND 81(a)(2).

21. F.R.Civ.P. 81(a)(2) provides for a response to an action initiated pursuant to 28 U.S.C. 2254 within three days and for an extension of time for a response of up to forty days. The rule states that an extension of time for a response may be granted however it makes no provision for a respondent to allow what has been deemed the almost"automatic response extension of twenty days"[5] to expire and then to move for an extension of time. Petitioner should have been heard unopposed when the petition was responded to by a motion for an extension of time 30 days after the petition was filed.[6] See Curtis v. Perrini, 301 FSupp 444 (N.D. Ohio 1968), affd. 413 F2d 546 (6th Cir. 1969).

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[5]Curtis v. Perrini provides an indepth discussion of the procedure involving nunc pro tunc responses to a petition initiated pursuant to 28 U.S.C. 2254 and it is here that the Courts have determined that a respondent has three days to respond an a virtually automatic extension for twenty days. However they have also held that once that initial twenty three day period expires the petitioner should be heard unopposed.

[6]The original petition was filed on July 30, 1980. Respondents moved for an extension of time of 15 days on August 30 and filed their response on September 14. The petitioner has never seen an order allowing the respondents to be heard but assumes that their answer was considered since the District Court refered to their argument in it's opinion and ruled against the petitioner. (The petitioner has not attached the original petition, the respondents request for an extension of time, his motion for summary judgement, and the respondent's answer, since they are extremely lengthy, but has requested a transmission of the record of the proceedings which are in the possesion of the clerk of the Third Circuit. Petitioner will attach any pertinent parts of the record which this court wishes to review in a supplemental appendix, if necessary.)

C

THE DISTRICT COURT ERRED WHEN IT DID NOT ISSUE A SHOW CAUSE ORDER PURSUANT TO 28 U.S.C. 2243.[6a]

22. Petitioner moved the District Court to issue an order to the respondents to show cause as to why the writ should not issue forthwith in accordance with the provisions of 28 U.S.C. 2243. Instead of ruling upon the petitioner's motion, or issuing the order pursuant to the statute the District Court again followed the same procedure as when the petitioner file his motion for summary judgement, the motion was ignored and never even addressed by the District Court. At the time the petitioner moved for the issuance of this order he done so in good faith, since his petition had been filed over 80 days ago and he was seeking release from custody that he believed was illegal and was resorting to the supposedly swiftest remedy available at hand to redress illegal state custody after he had exhausted state remedies available to him by appealing to the highest state court. The District Court acted contrary to the statute denying the petitioner the issuance of an order to which he was entitled.

[6a] Petitioner moved the District Court for the issuance of the Show Cause Order on October 20, 1980; As with the brief and motion for summary judgement the brief and motion is not appended here but should appear in the record that the petitioner has requested transmission of from the Third Circuit. If any materials are not present in that record the petitioner will supplement his appendix to include any documents needed to establish proof of a fact that occurred during the litigation of this matter which is absent from the record.

D

THE DISTRICT COURT ERRED IN CONSIDERING THE NUNC PRO TUNC ANSWER OF THE RESPONDENTS.

23. Petitioner will rely on the argument propounded in prargraph twenty-one. And would ask that this Court take note of the opinion of the District Court (Pa2-6) which makes it obvious that the respondents answer was considered but does not note an order issued allowing them to respond out of time. Petitioner should not have had to contend with the answer that was not timely filed, and should have been granted the writ without having to contend with the merits of the response. Petitioner also relies on Curtis v. Perrini infra., in support of his petition.

E

THE DISTRICT COURT ERRED IN NOT CONSTRUING THE UNREFUTED ALLEGATIONS OF THE PETITION TRUE, CONTRARY TO 28 U.S.C. 2245.

24. In the original petition, petitioner alleged that he had substantive issues to address on appeal and that he had an excellent prior record on bail, and therefore should be released on bail. The respondents did not even address the issue of the substantive issues to be presented in their out of time response. At that the District Court should have construed that allegation to be true and assumed the New Jersey's Supreme Court denial of bail to be an arbitrary one.

As to other issues the respondents did not refute them, unless the refuting of a fact is established by the statement of unsubstantiated opinion or outright perjury. The statement that petitioner will have more motivation to flee that he now stands convicted of first degree murder, consists of pure speculation. Defendant admitted a rather extensive prior criminal record. However he contends that this is an instance in which an extensive prior record is a factor in his favor. When facing lengthy prison terms in the past the petitioner has never taken flight. As recently as 1979 the petitioner was free on post-conviction bail on a criminal extortion conviction. In that matter he was free on his own recognizance after conviction, and with permission of the Colorado District Court was living in New Jersey. Respondents also stated there was no secret indictment after the petitioner alleged pre-arrest delay and the suppression of exculpatory evidence during the time a secret indictment was being obtaind as a substantive issue to be presented on appeal. On attempted challenge of the allegation in that case the attorney general commited perjury to refute an allegation. This constituted an abuse of the discretion of the District Court. The Court should have construed the allegations of the petitioner to be true in conformance with the statute and not considered the perjured and conjectured testimony given by the respondents.

F

THE DISTRICT COURT VIOLATED THE DUE PROCESS RIGHTS OF THE PETITIONER WHEN AN EVIDENTIARY HEARING AND ORAL ARGUEMENT WAS NOT ORDERED WHEN DISPUTES WERE PRESENT AS TO FACT.

25. Since there were disputes as to facts involved as well as legal merits of the petition the District Court erred in not complying with the due process rights of the petitioner to settle the facts by the presentation of the facts through evidence at a hearing in the District Court. The action of the District Court to not find the action of the New Jersey Supreme Court arbitrary done away with the petitioner's contention that he was a good bail risk, and negated the rightful opportunity available to him via the due process rights secured under the Constitution to verify these facts through the testimony of witnesses that could have been presented in an evidentiary hearing in the District court. At a hearing the petitioner would have been able to conclusively demonstrate to the District court that he had been secretly indicted, the victim of pre-arrest delay and the suppression of exculpatory evidence, and that these constituted substantive issues to be addressed on direct appeal of his conviction entitling him to release on bail pending the determination of the said appeal. At this stage in the proceedings it would be pure conjecture to speculate as to wheter the facts presented by the petitioner at a hearing would have swayed the court in determining that the petitioner was being held illegally and arbitrarily denied bail pending appeal by the New Jersey Supreme Court.

26. In addition the denial of an evidentiary hearing the

accompanying denial of oral arguement can be presumed to be nothing but an arbitrary determination by the District court that a convicted murderer serving a life sentence was not desired in a courtroom to offer arguement on the illegality of his confinement. The District court's determination was not the proper one. The court was not in the position to decide what was desirous to its own ends but on the contrary what was required for justice to be served in the situation at hand. Petitioner would have been granted oral arguement if represented by counsel. Because of him acting pro se the court decided there would be no oral arguement. This a clear due process violation. The United States Supreme Court's reasoning in a like situation is clearly in favor of the petitioner's stance. There, this court stated that the Sixth Circuit had the authority to issue a writ for a convict serving 65 years in Alcatraz so that he could be brought to Chicago to argue his appeal before the Circuit Court in person since he was representing himself on his direct appeal in Price v. Johnston, 323 U.S. 40, 67 SCt 1757 (1947).

G

THE DISTRICT COURT SHOULD HAVE ISSUED A CONDITIONAL WRIT THAT WOULD HAVE BECOME AFFECTIVE ABSENT THE NEW JERSEY SUPREME COURT ADMITTING THE PETITIONER TO BAIL OR PROVIDING A STATEMENT OF REASONS AS TO WHY THE PETITIONER HAD BEEN DENIED BAIL.

27. The only just course open to the District court if

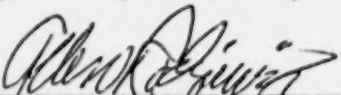
the writ was not issued was to comply with Abbott, infra., and order a conditional writ to be issued if the New Jersey Supreme Court did not issue an order admitting the petitioner to bail or statement of reasons as to why bail had been denied after a full and proper hearing was had before the New Jersey Supreme Court to ascertain if the petitioner should be ordered enlarged on bail.

IX

CONCLUSION

28. Because of the issues previously mentioned and because this Court has never firmly established what should be done in compliance with timely responses and their need to be timely filed when responding to a petition for a writ of habeas corpus nor has it ever laid down firm guidelines regaring admitting a criminal defendant to bail pending appeal of his conviction petitioner requests this Court to grant certiorari and review the appropriateness of the actions taken below in this matter.

Respectfully Submitted,

DATED: May 17, 1981 By: X 

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UNITED STATES SUPREME COURT

Docket No.-_____

ALLEN RODZIEWICZ, # 64141
New Jersey State Prison;
Petitioner;

-V-

GARY J. HILTON, Superintendent,
Trenton State Prison, and

JOHN J. DEGNAN, Atterney General of the
State of New Jersey;
Respondents.

PETITION FOR CERTIORRARI

Petitioner hereby petitions this Court for certiorrari to the United States Court Of Appeals For The Third Circuit, which denied the petitioner a writ of habeas corpus on May 1, 1981. In accordance with Rule 12 of this court, petitioner requests the record of proceedings in this matter be transmitted to this Court and in accordance with Rule 46 of this Court requests leave to proceed in forma pauperis since indigency has been established in all prior proceedings below.

Undersigned will rely on attached in support of this petition.

Respectfully, Submitted,

DATED: May 17, 1981

ALLEN RODZIEWICZ

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PRESENTLY CONFINED

UNITED STATES SUPREME COURT

Docket No.-_____

ALLEN RODZIEWICZ,

Petitioner-Appellant;

-V-

GARY J. HILTON, Superintendent, State Prison, et.als,

Respondents-Appellees.

: REQUEST FOR TRANSMISSION OF RECORD

Pursuant to Rule 12 of this Court, undersigned petitioner-appellant hereby requests this Court issue an order for the Clerk of the United States Court of Appeals For The Third Circuit transmit the entire record of proceedings in this matter under Docket No. 81-8027 (Misc) and for the clerk of the United States District Court For The District Of New Jersey at Trenton to submit the entire record of proceedings to this Court docketed under Docket No. 80-2389.

Respectfully Submitted,

DATED: May 17, 1981

Allen Rodziewicz
ALLEN RODZIEWICZ

UNITED STATES SUPREME COURT

ALLEN RODZIEWICZ,

Petitioner-Appellant;

-V-

GARY J. HILTON, Superintendent, et.als.,

Respondent-Appellee.

MOTION TO PROCEED INFORMA PAUPERIS

Petitioner-appellant hereby moves this Court for motion to proceed in forma pauperis based on the fact that indigency status has been previously granted in this action by the United States District Court for the District of New Jersey and the United States Circuit of Appeals for the Third Circuit, and asks that leave to proceed in forma pauperis be granted in conjunction with 28 U.S.C. 1915 and F.R.A.P. 4 since his status has not changed since the filing of the original petition.

Respectfully Submitted,

DATED: May 17, 1981

ALLEN RODZIEWICZ # 66141
Drawer "N"
Trenton State Prison
Trenton, N.J. 08625
Petitioner-Appellee, Pro Se

PRESENTLY CONFINED